In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Adversary Proceeding
GEORGE H. LIVERMORE	)	
(Chapter 7 Case Number 00-21093)	)	Number 03-2004
	)	
Debtor	)	
	)	
	)	
	)	
DAWN LIVERMORE	)	
	)	
Plaintiff	)	
	)	
	)	
v.	)	
	)	
GEORGE H. LIVERMORE	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

A complaint to determine dischargeability of a debt came before the Court for trial on August 7, 2003. This Court has jurisdiction over this matter pursuant to 11 U.S.C. § 157. Based on the evidence, citations of authority and other applicable authority, I make the following Findings of Fact and Conclusions of Law in accordance with the directives of Bankruptcy Rule 7052.

FINDINGS OF FACT

Plaintiff and Debtor were married for a number of years and lived together as husband and wife until March 28, 2002, when a final decree of divorce was entered by the Superior Court of Wayne County, Georgia. Included in that decree were numerous provisions for alimony, child support and division of property. The matter in issue in this proceeding relates to the terms of section 6(c) which reads as follows:

> Consistent with the order of the United States Bankruptcy Court in Chapter 11 Case Number 00-21093-LWD, Southern District of Georgia, the Wife's interest in estate property proceeds shall be limited to $25,000.00, payable to the wife as alimony from the estate, consistent with any order of the bankruptcy court, after all secured, unsecured, administrative claims and trustee fees are paid, or payment of any other payments authorized by the bankruptcy court. If there is not $25,000.00 in the estate to be paid to the Wife, then the Husband shall pay the shortfall in 36 equal monthly installments beginning the first month after the referenced bankruptcy case is closed.

Debtor filed a Chapter 11 bankruptcy on August 29, 2000. On August 21, 2002, Debtor's ex-spouse, Dawn Livermore, filed a Motion to Allow Payment and Filing of a Late Proof of Claim. The Court's Order of August 22, entered on August 23, 2002, provided in relevant part: "That Movant [Dawn Livermore] is allowed to file a late Proof of Claim evidencing a priority claim for alimony in the amount of $25,000.00." Richard L. Roble, Attorney for Debtor, and William B. Johnson, Attorney for Movant, Mrs. Livermore, Plaintiff herein, consented to the order. The Court converted Debtor's Chapter

11 bankruptcy to a Chapter 7 bankruptcy on October 15, 2002.

In this proceeding, Mrs. Livermore seeks a determination that the $25,000.00 lump sum amount provided for in the final divorce decree and provided for in this Court's Order is non-dischargeable alimony based upon the dual theories of collateral estoppel and that under § 523(a)(5), the $25,000.00 lump sum amount is "actually in the nature of support" or alimony.

CONCLUSIONS OF LAW

1. Collateral Estoppel

Collateral estoppel applies when, in the sound discretion of the trial court, the identical issue sought to be litigated in the action at bar was "actually and necessarily decided" in the prior action. Brown v. Felsen, 442 U.S. 127, 139 n.10, 99 S. Ct. 2205, 2213 (1979). Application of collateral estoppel requires that

> (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

CSX Transp., Inc. v. Bhd. of Maint. of Way Employees, 327 F.3d 1309, 1317 (11th Cir.

2003).

The principle of collateral estoppel applies to both ordinary judgments entered by a court and consent orders. United States v. Jefferson County, 720 F.2d 1511, 1517 (11th Cir. 1983). However, with a consent order, the second and third requirements of collateral estoppel, the requirements of actual litigation and that the determination of the issue must be a critical and necessary part of the actual litigation, will never be satisfied. Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., 575 F.2d 530, 539 (5th Cir. 1978).[1] Despite the absence of an actual litigation, a litigant can be collaterally estopped from pursuing an issue addressed by a consent order. However, "a consent judgment cannot constitute collateral estoppel unless the party pleading collateral estoppel proves from the record of the prior case or through extrinsic evidence that the parties intended the consent judgment to operate as a final adjudication of a particular issue." Balbirer v. Austin, 790 F.2d 1524, 1528 (11th Cir. 1986); *see also* Kaspar Wire Works, 575 F.2d at 539 (stating that court should determine judicial consent decree's impact by issues actually intended to be precluded by parties).

Intent can be inferred from the record or from the words of the consent decree itself. Kaspar Wire Works, Inc., 575 F.2d at 540. In this case, the language of the

[1]In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as precedent all decisions from the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

August 23 Order provides: "That Movant is allowed to file a late Proof of Claim evidencing a priority claim for alimony in the amount of $25,000.00." The Order plainly evidences the claim is to be considered a priority claim for alimony. Debtor in effect concedes as much in failing to suggest that the language meant something other than that suggested by its clear meaning. Halpern v. First Georgia Bank (In re Halpern), 810 F.2d 1061, 1064 (11th Cir. 1987). From the clear and plain language of the Order, it can be inferred that when Debtor consented to the Order, he intended it to operate as a final determination that the claim was for alimony.

In addition to intent, the remaining two requirements of collateral estoppel must also be satisfied. Debtor's interest in preventing the claim from being filed is identical to his interest in having the claim discharged in his Chapter 7 proceeding thereby satisfying the third requirement. However, the final requirement that the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in an earlier proceeding is not satisfied. Although Debtor's attorney had a full and fair opportunity to dispute the language of the Order prior to consenting to it, the Chapter 7 Trustee did not have the same opportunity. The Order was entered on August 23, 2002, but the Chapter 11 proceeding was not converted to a Chapter 7 proceeding until this Court entered the Order for Relief Under Chapter 7 on October 15, 2002. Therefore, Trustee, who was not a party to the case at the time of the consent Order, should not be bound, and thereby collaterally estopped, from asserting the claim is not a priority claim for alimony.

See United States v. Jefferson County, 720 F.2d 1511, 1518 (11th Cir. 1983) (noting that a final judgment may not bind a nonparty when their interests were not represented).

I conclude, therefore, that Debtor and Trustee are not collaterally estopped from litigating whether the $25,000.00 claim is to be treated as alimony.

2. 11 U.S.C. § 523(a)(5)

As to the second theory, I find that even though there is no collateral estoppel, the claim is still excepted from discharge as alimony under 11 U.S.C. § 523(a)(5). Generally, all individual debts are dischargeable in a Chapter 7 bankruptcy; however, 11 U.S.C. § 532(a) provides exceptions to dischargeability. 11 U.S.C. § 523(a)(5) provides that a Chapter 7 discharge:

> (a) does not discharge an individual debtor from any debt–
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that–
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

In Smith v. Smith (In re Gene Kyle Smith), Adv. Nos. 96-2054 & 96-2085, Ch. 7 Case No. 95-20524 (Bankr. S.D. Ga. Dec. 30, 1997), this Court, relying extensively on Harrell v. Sharp (In re Harrell), 754 F.2d 902 (11th Cir. 1985), articulated the following legal framework for an (a)(5) determination:

> The burden of proof in establishing the Section 523(a)(5) exception is on the non-debtor spouse. However, although exceptions from discharge are normally construed strictly against the objecting creditor in order to provide the debtor with a "fresh start," policy considerations require a bankruptcy court to construe domestic relations exceptions more liberally.
>
> Under Section 523(a)(5), the non-debtor spouse must show that the obligation in issue is actually in the nature of support. If this burden is met, the burden of going forward shifts to the debtor to rebut the evidence that the provision is actually in the nature of support under Section 523(a)(5). The ultimate burden remains with the creditor seeking to except the debt from discharge. The relevant time for making the Section (a)(5) analysis is the time of the decree.
>
> . . . . The bankruptcy court must independently assess the character of an obligation arising out of a divorce and determine whether it is in the nature of alimony. Section 523(a)(5) requires that the bankruptcy court determine nothing more than whether the payment obligation is in the nature of "alimony, maintenance, or support." No precise inquiry into the parties' present financial circumstances is required; only a simple inquiry into the nature of the obligation, liquidating known amounts and leaving any issue of future modifications to the applicable state court.

> In determining whether a debtor's obligation is in the nature of support, the intent of the parties [or the trier of fact] at the time of the settlement agreement or trial is dispositive. While a label placed upon spousal obligation is not dispositive in determination of dischargeability, it is indicative of the parties' intent.

Id. slip op. at 10-12 (internal citations omitted).

The most critical factors to be considered in interpreting the parties' intent with respect to the provisions of a divorce settlement include: (1) any disparity in the parties' earning capacities; (2) the parties' relative business or employment opportunities; (3) the parties' physical condition; (4) the parties' educational background; (5) the parties' probable future financial needs; (6) benefits that each party would have received if the marriage had continued. Id. at 12. (citing Dennis v. Dennis (In re Dennis), 25 F.3d 274, 279 (5th Cir. 1994), *cert. denied,* 513 U.S. 1081 (1995)).

In this case, the decree incorporated an agreement of the parties which provided in section 3 for alimony in the amount of $2,000.00 per month for twelve months, followed by $2,500.00 per month for nine years in alimony and provided "all other alimony shall be paid according to section 6(c) of this order." Section 6(c) provides that "the Wife's interest in estate property proceeds shall be limited to $25,000.00, payable to the wife as alimony from the estate." In addition, the claim was specified as a claim for alimony in the consent Order entered by this Court on August 23, 2002. While these labels are not

dispositive, they are indicative of the parties' intent that the claim be considered alimony.

Plaintiff testified that the agreement regarding the $25,000.00 was reached after lengthy, stressful negotiations and that her intent was to insure that she would have a lump sum available to buy-out the lease of the vehicle she was driving at the expiration of the term of the lease in 2004. Accordingly, she contends that the amount was intended to provide basic transportation for herself and the children of the marriage and is actually in the nature of support. *See* Lane v. Lane (In re Lane),147 B.R. 784, 787 (Bankr. N.D. Okla. 1992) (holding car provides a necessity of life in form of transportation and therefore does contribute to support and is nondischargeable). She further testified that Debtor wished to have this lump sum payment labeled as alimony so that he could deduct it and she would bear the tax burden upon that payment.

Debtor testified that the $25,000.00 figure was arrived at because it was anticipated that this would be the equity he could recover from the sale of the piece of marshfront property which the parties owned, but had not built a house on, that it represents nothing more than a straight division of property, and is not in the nature of alimony. Unfortunately, because an obligation to SunTrust was cross-collateralized not only by real estate acquired through the proceeds from the SunTrust loan, but also by other collateral including the marshfront lot, there were, in fact, no excess proceeds received by Debtor's estate at the time of the sale of that lot. Accordingly, Debtor contends that in the final

analysis the property division unexpectedly yielded no net proceeds to wife but that no monetary obligation to her should survive his discharge.

At the time of the parties' divorce, Debtor was a physician, a graduate of the Armed Services Medical School with 16 years medical experience, followed by additional years of private practice in the Wayne County, Georgia area, and by subsequent employment in Memphis, Tennessee, where, until recently, he practiced with a group of physicians. While Debtor has had periods of unemployment and was unable to make his individual private practice succeed in the Wayne County area, he clearly has high income potential and has, in fact, earned substantial pay during significant periods in the past. Plaintiff is trained as an LPN. Although she is not working at present, she is able to earn a reasonable amount of income although clearly the predominant earning ability resides in the Debtor. There was no other evidence concerning the relative income and resources of the parties at the time of the divorce.

Although the divorce decree does not specify that the obligation will terminate upon the death or remarriage of the ex-spouse, the other traditional factors considered in interpreting the parties' intent weigh in favor of determining that the $25,000.00 is alimony: The label attached to the provision is consistent with the parties' intent to assist wife in obtaining a basic necessity; Debtor's income was substantially greater than wife's; Debtor elected to treat the payment as deductible for income tax

purposes.

I conclude, therefore, that § 523(a)(5) applies to except the $25,000.00 obligation from discharge.

O R D E R

Pursuant to the foregoing findings of fact and conclusions of law, IT IS THE ORDER OF THIS COURT that the $25,000.00 obligation of Debtor to his former wife, Dawn Livermore, is non-dischargeable.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 2003.